

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000292-001 DT

04/09/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: \_\_\_\_\_

WALKER DESIGN BUILD INC

BURTON T COHEN

v.

ARIZONA STATE REGISTRAR OF  
CONTRACTORS (001)  
BENNY ASPRELLA (001)  
ANGELA ASPRELLA (001)

MONTGOMERY LEE  
G GREGORY EAGLEBURGER

AZ REGISTRAR OF CONTRACTORS  
OFFICE OF ADMINISTRATIVE  
HEARINGS

MINUTE ENTRY

**Standard of Review**

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved

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an abuse of discretion.<sup>1</sup> The reviewing court may not substitute its own discretion for that exercised by an administrative agency,<sup>2</sup> but must only determine if there is any competent evidence to sustain the decision.<sup>3</sup>

This matter has been under advisement since February 11, 2004, the time when the case was submitted without oral argument. This Court has considered and reviewed the record of the proceedings and the memoranda submitted. This Court notes from the certification of record on review from the Office of Administrative Hearings, that no party has designated a transcript of the hearing held by the administrative law judge to be part of the record. This Court has not received a transcript of that hearing.

### **Case History**

The Plaintiff, Walker Design Build, Inc., defended against several complaints filed by Benny and Angela Asprella, Real Parties in Interest in this case. Plaintiff, Walker Design Build, Inc. contracted to build the Asprella's home in Fountain Hills in October of 2000. The Asprella's filed several complaints against Plaintiff with the Registrar of Contractors. Several of those complaints were heard by Administrative Law Judge Diane Mihalsky on January 22, 2003. At the conclusion of the hearing, ALJ Mihalsky found in favor of the Plaintiff on most of the allegations but concluded in paragraph 7 and 8 of her decision:

With respect to the four exterior columns, certain specific areas of the drywall, certain specific areas of interior baseboard, the frame on two specific doors, one kitchen wall, the glass in the window at the family room northwest end, and the rough finish on the family room exterior door casing at the northwest corner complainants (the Asprellas) have established a violation of A.R.S. Section 32-1154(3) (a violation of a rule adopted by the Registrar of Contractors requiring that "all work shall be performed in a professional and workmanlike manner") and (7) ("the doing of a wrongful or fraudulent act by the licensee as a contractor resulting in another person being substantially injured").

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<sup>1</sup> *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980); *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977);

<sup>2</sup> *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

<sup>3</sup> *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

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Complainants have also established a violation of A.R.S. Section 32-1154(A)(13) in that Respondent (the Plaintiff Walker Design Build, Inc.) failed to display its license number on the contract it drafted.<sup>4</sup>

The ALJ also recommended that had Plaintiff's contractor's license not been previously revoked, these violations would have established cause for penalties to be imposed on the Plaintiff's license. This recommended order and decision was later modified by the Registrar to provide for revocation of the Plaintiff's contractor's license, the ALJ having mistakenly believed that Plaintiff's license had already been revoked.

**Issues Presented for Review and Discussion**

Plaintiff contends that the Administrative Law Judge erred in her conclusion and finding of a violation of A.R.S. Section 32-1154(7). This subsection involves "the doing of a wrongful or fraudulent act by the licensee", and Plaintiff argues that no evidence exists to support this finding by the Administrative Law Judge. Unfortunately, Plaintiff failed to order a transcript of the evidentiary hearing held before the ALJ. This Court is not able to review that record to determine, in fact, if evidence was admitted that would support this finding. When matters are not included within the record, the missing portions of the record must be presumed to support the decision of a trial judge or hearing officer.<sup>5</sup> Thus, this Court must presume that the missing transcript would support the ALJ's conclusion. Clearly, the findings within the ALJ's order establish substantial evidence exists to sustain that decision.

The Plaintiff also contends that the revocation of its license was arbitrary and capricious, and an abuse of discretion. Plaintiff argues that the revocation of its license was disproportionate to the minor deficiencies found by the ALJ. Unfortunately, the record does not contain any information that would indicate why revocation of a contractor's license would be indicated. More importantly, it appears that the ALJ was not privy to Plaintiff's current license situation at the time she issued her recommended order and decision. Given these uncertainties, the lack of record, and the lack of information within the record provided that would support a revocation, this matter will be remanded for reimposition of the sanction (a new recommendation by the ALJ to the Registrar).

IT IS ORDERED granting the relief requested by the Plaintiff, in part.

IT IS FURTHER ORDERED reversing and vacating only that portion of the Registrar's order revoking Plaintiff's license.

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<sup>4</sup> ALJ Mihalsky's decision of February 5, 2003, at page 18.

<sup>5</sup> See, Baker v. Baker, 183 Ariz. 70, 900 P.2d 764 (1995); State v. Mendoza, 181 Ariz. 472, 891 P.2d 939 (1995);

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IT IS FURTHER ORDERED remanding this matter back to the Office of Administrative Hearings, and to the assigned Administrative Law Judge, for purposes of a hearing or oral argument, from which the Administrative Law Judge may make recommendations to the Registrar of Contractors for imposition of an appropriate sanction in this case.

IT IS FURTHER ORDERED directing counsel for the Plaintiff to lodge an order consistent with this minute entry opinion no later than June 1, 2004.